Petition

81-849

No.

Office - Supreme Court, U.S.
FILED
NOV 5 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

—against—

BENJAMIN G. SPRECHER,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BENJAMIN G. SPRECHER, ESQ.
Pro Se
11 Park Place, Suite 1715
New York, New York 10007
Telephone: (212) 962-0878

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED FOR REVIEW		1
GROUNDS FOR THIS COURT'S JURISDICTION		5
THE FACTS		8
LEGAL ARGUMENT		
POINT 1	THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THIS COURT SHOULD ESTABLISH UNIFORM STANDARDS AS TO WHEN A HEARING IS REQUIRED IN A PROCEEDING TO ENFORCE AN ADMINISTRATIVE SUBPOENA	10
POINT 11	THE DECISION OF THE COURT OF APPEALS VIOLATES PETITIONER'S RIGHT TO A JURY TRIAL AND IS CONTRARY TO DECISIONS OF THIS COURT .	20
POINT 111	THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO FUNDAMENTAL DUE PROCESS, AND, IF PERMITTED TO STAND, WILL DEPRIVE DESERVING LITIGANTS OF AN OPPORTUNITY TO HAVE THEIR DAY IN COURT AGAINST ADMINISTRATIVE AGENCIES AND WILL ALLOW SUCH AGENCIES TO ACT IN BAD FAITH WITH IMPUNITY..	25
CONCLUSION		29
EXHIBIT A		30
EXHIBIT B		35

TABLE OF AUTHORITIES

BEACON THEATRES, INC. V. WESTOVER,
359 U.S.500 (1959) .....

GOLDMAN SACKS & COMPANY V. EDELSTEIN,
494 F. 2d 76 (2nd Cir.1974) .....

SEC V. ESM GOVERNMENT SECURITIES, INC.
(Current Binder) CCH Fed. Sec. L.
Rep., Par. 97,995 (5th Cir.1981) ....

UNITED STATES V. CHURCH OF SCIENTOLOGY,
520 F. 2d 818 (9th Cir. 1975) .....

UNITED STATES V. LA SALLE NATIONAL BANK,
437 U.S. 298 .....

UNITED STATES V. McCARTHY, 514 F. 2d
360 (3rd Cir. 1975) .....

UNITED STATES V. SALTER, 432 F. 2d 697
(1st Cir. 1970) .....

QUESTIONS PRESENTED FOR REVIEW

1. Is evidence required to obtain a hearing in a proceeding to enforce an administrative subpoena equivalent to the burden of proof required to demonstrate bad faith on the part of an administrative agency issuing the subpoena? In the instant case, the Court of Appeals held that a respondent challenging an administrative subpoena had the same "heavy burden" of proving bad faith in order to obtain a hearing as is required to quash the subpoena.

2. Can a summary proceeding to enforce an administrative subpoena where the court decides the question on affidavits preempt a trial by jury, as guaranteed by the Seventh Amendment, in a pending case, where the issues are identical to that raised in the summary proceeding. In the instant case, petitioner commenced an action against the SEC alleging that the subpoena in question

had been issued in bad faith. Subsequently, the SEC instituted a summary proceeding, obtained a decision on affidavits without a hearing and is seeking to collaterally estop petitioner from obtaining a trial by jury on the merits in his action against the SEC. The District Judge in the case filed by petitioner against the SEC has indicated that if the appellate process sustains the judgement of the District Court in the summary proceeding, he will hold that petitioner is collaterally estopped from pursuing the causes of action where the issues are identical to those in the summary proceeding.

3. Can an administrative subpoena be enforced despite the uncontradicted allegations that an investigator for the agency who was instrumental in issuing the subpoena acted in bad faith due to the fact that, according to the decision below, the bad

faith of an investigator for an administrative agency cannot be attributed to the agency.

4. Has a respondent in a summary proceeding to enforce an administrative subpoena demonstrated agency bad faith when an officer of that agency submits a perjurious affidavit in support of the agency's application to enforce the subpoena?

PARTIES BELOW

In addition to the parties set forth in the caption of the case, the Court of Appeals had before it Hersh Knopfler, Rabbi Kalman Pinter and Congregation Or Lashumain.

STATEMENT OF THE CASE

Grounds for This Court's Jurisdiction

A. Petitioner asks review of a judgement of the U. S. Court of Appeals entered on July 24, 1981. Said Court also denied a petition for rehearing on September 14, 1981.

B. This Court has jurisdiction to review the judgement of the Court below pursuant to 28 U.S.C. Section 1254.

C. This case involves the First Amendment and Seventh Amendment to the U.S. Constitution. The First Amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

The Seventh Amendment provides that:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

This case also involves 15 U.S.C.Section 77 v (b) and 15 U.S.C. Section 78 u (c), which were the bases of Federal Jurisdiction in the District Court.

15 U.S.C. Section 77 v (b) states that:

> In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

15 U.S.C. Section 78 u (c) states:

> In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an

order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered or to give testimony touching the matter under investigation or in question, and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

The Facts

This petition seeks review of a decision of a judgement of the U.S. Court of Appeals for the Second Circuit. The Securities and Exchange Commission issued an administrative subpoena directing the petitioner to appear to give testimony and to produce documents at an investigatory hearing. Petitioner challenged the validity of said subpoena in a motion filed with the SEC. Said motion asserted that the subpoena had been issued in bad faith and for the purpose of harassing petitioner. The SEC rejected petitioner's claims. Thereupon, petitioner commenced an action in the U. S. District Court for the Eastern District of New York and sought a declaratory judgement that the subpoena had been issued in bad faith. Petitioner also sought injunctive relief and damages for the unlawful actions of the SEC and its employees. Several days after the commencement of the

action by petitioner, the SEC instituted a proceeding in the U. S. District Court for the Southern District of New York effecting enforcement of the same subpoena which was the subject of petitioner's action in the Eastern District of New York.

In response to the proceeding brought by the SEC, petitioner asked the Court in the Southern District of New York to stay its hand pending the outcome of his case in the Eastern District of New York. Petitioner also set forth specific facts showing that the Agency had acted in bad faith in issuing the subpoena. Petitioner's allegations were not denied by the SEC.

The United States District Court for the Southern District of New York granted an order enforcing the subpoena in question without a hearing into the allegations of petitioner. This order was affirmed by the judgement of the Court of Appeals from which petitioner seeks review.

POINT I

The Petition For Certiorari Should Be Granted Because This Court Should Establish Uniform Standards As To When a Hearing is Required in a Proceeding to Enforce an Administrative Subpoena

Rule 17 of the Rules of the Supreme Court set forth the considerations which the Supreme Court takes into account in determining whether a petition for a Writ of Certiorari will be granted. The most compelling reason for granting certiorari is a conflict in decisions between Circuits 13 Moore's Federal Practice, Par.817.21.

Four other circuits have ruled on questions similar to those presented in the instant case. Each of them held that when an administrative agency seeks to enforce a subpoena, the District Judge is required to hold an evidentiary hearing when the respondent makes out a prima facie case of bad faith in enforcing the subpoena. Thus, the Fifth Circuit held, in SEC v. ESM

Government Securities, Inc., (Current Binder). CCH Fed. Sec. L. Rep., Par.97,995 (5th Cir. 1981) that the bad faith of an SEC investigator precludes the enforcement of a SEC subpoena. In the instant case, the Court of Appeals for the Second Circuit held that the bad faith of an agency investigator is insufficient to obtain a hearing. Clearly, the Second Circuit and the Fifth Circuit have rendered directly conflicting holdings on the identical question.

Moreover, the First Circuit and the Third Circuit have held that even weak allegations of bad faith mandate a hearing by the District Court on an application to enforce an administrative subpoena. United States v. McCarthy, 514 F. 2d 360 (3rd Cir. 1975); United States v. Salter, 432 F. 2d 697 (1st Cir. 1970). In the instant case, petitioner alleged that the SEC was guilty of a pattern of harassment dating back a considerable period of time

and was consistent in its approach. The evidence presented in the instant case was far stronger than that which was presented to the courts in McCarthy and Salter. The Court in United States v. Church of Scientology, 520 F. 2d 818 (9th Cir. 1975), also required a hearing when allegations of institutional bad faith are made.

Petitioner demonstrated that he was the victim of institutional bad faith and harassment on the part of the SEC. Sprecher had previously been a defendant in an action for injunctive relief brought by the SEC in a matter entitled SEC. v. Five Star Coal Company, et al, brought in the Soutern District of Ohio. The SEC withdrew its case against Sprecher, with prejudice, after it became obvious that its assertions were baseless and after the SEC had demonstrated gross misconduct in the prosecution of that case. The stipulation discontinuing the action in that matter includes an undertaking by Sprecher, done at the insistence of the

SEC, that he not sue the agency or any of its employees for their misconduct. In addition, the SEC agreed not to harass Sprecher in the future.

During the pendency of the Five Star matter, an order was entered in that case limiting discovery in the Five Star investigation to that allowed by the Federal Rules of Civil Procedure and conducted under the auspices of that court. The SEC then initiated an investigation in the matter of Commonwealth Western, Inc. This violated the aforementioned order in Five Star because the real purpose of that investigation was to avoid the strictures imposed by the court. As a result of this, petitioner moved to quash the SEC subpoena. Said matter was heard by the Court of Appeals for the Second Circuit, 594 F. 2d 317 (2nd Cir. 1979). That court affirmed the denial of the motion to quash the subpoena in that case, based on the SEC's representation that the inquiry did not involve Five Star.

Actually, the questions asked of Sprecher involved Five Star and had no bearing whatsoever on Commonwealth. Thus, the SEC made false representations to the Court of Appeals when it told the panel hearing the case that the inquiry it was conducting did not involve Five Star.

The instant investigation involves the same pattern of harassment, misconduct and falsification. Here also, the SEC attempted to mislead the court below by referring to Sprecher as a defendant in the Five Star matter, without setting forth the fact that the SEC terminated the case with prejudice. Furthermore, the affidavit submitted by the SEC in support of its motion below was clearly false, in that it asserted that the SEC discovered that petitioner was the president of ATR, the company under investigation, in 1977, subsequent to the time that an SEC investigator, Jacob Graber, met with Sprecher in March of 1980.

The SEC concealed from the court the fact that they had in their possession an "opinion letter" concerning ATR written by Sprecher, which Sprecher had given to Graber the investigator, and which contained the information that he had been president of ATR. Furthermore, the assertion in that same paragraph of the affidavit that Sprecher had sold 300,000 shares of ATR was intended to give the misleading impression that the stock was distributed to the general public. These statements were not innocent misstatements. Rather, they were deliberately designed to make it appear that petitioner had concealed facts from the SEC. In fact, the SEC had concealed facts from the Court. This is evident from the fact that while the SEC submitted all papers which had any bearing on this case, including postal receipts, to the District Court, the agency failed to include the opinion letter which clearly contained the

information which the SEC alleged Petitioner had concealed. Thus, it is apparent that the allegations were deliberately phrased in such a manner as to mislead the Court into believing that petitioner had acted illegally. It was evident that Petitioner had acted legally in his capacity as attorney. Furthermore, investigator Graber went to various people and impugned Sprecher's reputation, told them that the SEC was after him and even permitted the president of ATR to avoid certain registration requirements in exchange for false testimony about Sprecher.

The foregoing allegations clearly set forth a case of bad faith and harassment. Moreover, none of the allegations were denied by the SEC. The District Court was clearly obligated to hold an evidentiary hearing to determine whether the assertions were correct. Indeed, since petitioner's allegations of bad faith and misconduct were uncontradicted, the District Court, if it were to decide the SEC

application on the affidavits, should have decided in favor of petitioner. There was no basis in the affidavit submitted to the District Court for holding otherwise. In any event, it is clear that a hearing would have been required in the First, Third, Fifth and Ninth Circuits. There is no question that the allegations of institutional bad faith in the instant case were far from weak, although what the courts in Church of Scientology and McCarthy characterized as "thin" allegations would have been sufficient to require a hearing in the Third and Ninth Circuits.

Moreover, the SEC is fully aware of the uniqueness of the decision of the Second Circuit. This is evident from the fact that the agency moved to have the Court of Appeals publish the opinion in this case. In a discussion between one of the attorneys representing one of the appellants below and counsel for the SEC, the latter explained that the Agency

wished to have the opinion published because courts in other circuits were deciding similar cases adversely to the SEC. If the decision of the Second Circuit is permitted to stand, all agencies will be able to engage in harassment of individuals and undertake investigations in bad faith without fear that their subpoenas may be quashed.

This case presents an opportunity for this Court to establish uniform standards for determining when a hearing is required in a proceeding to enforce a subpoena. Indeed, if this Court fails to hear this matter, the special circumstances of the instant case will render the opinion below the supreme law of the land. This is because the uniqueness of the Second Circuit opinion in this case will allow the SEC to conduct its inquiries out of its regional office within the Second Circuit and will thus permit the agency to render the opinion in this case the supreme law of the land in most cases. Indeed, it is

significant that under ordinary SEC procedures, this matter should have been investigated by the SEC's Regional Office based in Texas, since the corporation under investigation is located in that state. However, it would appear that the SEC was well aware of the fact that the federal courts in Texas, which are within the jurisdiction of the Court of Appeals for the Fifth Circuit, would have taken a dim view of the tactics employed in the instant case.

POINT II

The Decision of The Court of Appeals Violates Petitioner's Right To a Jury Trial and is Contrary to Decisions of This Court

The decision of the Court of Appeals violates Petitioner's right to a trial by jury and is contrary to decisions of the U. S. Supreme Court. Specifically, it conflicts with Supreme Court decisions which have held that parties are entitled to trial by jury when they bring actions at law,even if there is a related suit in equity.Petitioner brought an action against the SEC in the U.S. District Court for the Eastern District of New York, seeking damages for the unlawful actions of the SEC and its employees which were committed in conjunction with the investigation in question. Sprecher was entitled to a jury trial in the Eastern District of New York. The SEC then attempted to preempt petitioner's right to a jury trial by bringing a subpoena enforcement pro-

ceeding in the U. S. District Court for the Southern District of New York. The purpose underlying the commencement of the summary proceeding in the Southern District of New York was to deny petitioner a trial by jury, to deny him discovery and, above all, to obtain immunity for the SEC from a lawsuit designed to hold the agency accountable for outrageous acts committed by them.

It is manifestly evident that the only reason the proceeding in the Southern District of New York was initiated was to deny petitioner the rights set forth heretofore. This is evident from the fact that the proceeding commenced by the SEC was not necessary for the purpose of obtaining appellant's testimony. Since he was a plaintiff in an action against the SEC, the Commission was free to depose him in that action. Thus, appellant's testimony was available even if the proceeding to enforce the subpoena had not been commenced. Moreover, petitioner

repeatedly expressed, to both the SEC and the District Court for the Eastern District of New York, his willingness to be deposed by the SEC. Indeed, the SEC has not, to date, sought any discovery from appellant in the action pending in the Eastern District of New York. Consequently, it is obvious that the SEC brought the proceeding in the Southern district of New York in order to immunize itself from suits against it. If the decision of the court below is sustained, the SEC will have carved out for itself an immunity not accorded to the agency by Congress. Moreover, other administrative agencies are bound to follow suit, thus placing them beyond the scope of a citizen seeking relief from oppressive and unlawful procedures.

Despite petitioner's plea that the court in the Southern District of New York transfer the matter to the Eastern District of New

York, that court decided the question summarily and without a hearing. The court should, at least, have abstained until the court in the Eastern District rendered a decision. The court thereby deprived petitioner or his right to a trial by jury by collaterally estopping him from litigating the claims in the Eastern District of New York before a jury. The Court of Appeals' affirmance of the action of the District Court for the Southern District clearly is in conflict with the mandate of the Supreme Court that actions at law be tried by a jury before equitable claims are disposed of, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). Indeed, the lower court's decision conflicts with another decision of that tribunal. In Goldman Sacks & Company v. Edelstein, 494 F. 2d 76 (2nd Cir. 1974) the court held that a District Judge should not decide equitable claims which would preclude the trial of

legal claims before a jury. Petitioner raised this question below, but the Court of Appeals did not protect his right to jury trial.

If the decision of the Court of Appeals is sustained by virtue of the fact that the petition herein is not granted, administrative agencies will be able to immunize themselves from legal actions commenced against them in connection with the issuance of subpoenas by commencing proceedings purporting to enforce subpoenas. Moreover, such proceedings, under the decision communicated in this case by the Court of Appeals, will allow administrative agencies to preclude actions against them by virtue of collateral estoppel without any form of a hearing.

POINT III

The Decision of The Court of Appeals is Contrary to Fundamental Due Process, and, if Permitted to Stand, Will Deprive Deserving Litigants of An Opportunity to Have Their Day in Court Against Administrative Agencies and Will Allow Such Agencies to Act in Bad Faith with Impunity

The decision of the court below that allegations of bad faith against an individual do not constitute a sufficient showing of bad faith by an administrative agency violates the mandate of this Court in United States v. La Salle National Bank, 437 U. S. 298. There, the Supreme Court held that a determination as to whether an administrative agency had issued a subpoena in bad faith must be determined by looking at the actions of individual investigators. Indeed, simple logic dictates that agency bad faith can only be determined by an inquiry into whether an investigator involved in a particular investigation acted in bad faith. Whether or not an individual investi-

gator's bad faith actions should be attributed to an agency depends on all of the circumstances. Clearly, such could be determined only after an evidentiary hearing.

This is particularly true where, as in the instant case, the SEC did not deny appellant's allegations that the investigator in question caused the subpoena to be issued and that he was guilty of acting in bad faith. In addition, petitioner showed a pattern of harassment on the part of individual employees of the SEC.

There can be no question that when a respondent has shown bad faith on the part of an employee of an administrative agency and has alleged specific facts in support of his allegation, a hearing must be held in order to determine what effect the individual bad faith had on the agency. The determination of the Court of Appeals would preclude anyone from obtaining a hearing as it is impossible to prove agency bad faith except by demonstrating

the bad faith of an individual or individuals acting on behalf of the agency.

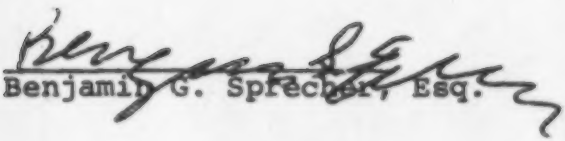
An individual who seeks to quash a subpoena cannot be expected to prove his case by affidavit. Rather, once a prima facie case of bad faith has been shown, a court must hold an evidentiary hearing in order to afford a party an opportunity to prove his case. In the absence of such an opportunity, an individual challenging a subpoena will be denied simple due process to which he is entitled.

A hearing was particularly important in the instant case where the allegations of bad faith involve the worst possible motives, including violation of petitioner's First Amendment and Seventh Amendment rights and a demonstration that the Assistant Regional Administrator of the SEC had committed perjury in his affidavit to the District Court which he submitted in support of the SEC's application for an order enforcing the subpoena in question. Surely, no court could condone perjury and vio-

lation of fundamental constitutional rights. The decision of the Second Circuit can only encourage administrative agencies to issue subpoenas without any legitimate basis for whatever motives drive a particular investigator. Administrative agencies will know that, in the Second Circuit, they can proceed with impunity and without fear that a court will review their actions under any circumstances. Clearly, fundamental notions of due process and simple fairness dictate that the decision of the Court of Appeals is subject to very serious question. If this Court does not reverse the judgement below, agencies will be free to issue subpoenas for the worst possible motives and the judicial review of the enforcement of subpoenas will be meaningless.

CONCLUSION

For the foregoing reasons, the undersigned respectfully requests that this Petition for a Writ of Certiorari be granted.



Benjamin G. Sprecher, Esq.

EXHIBIT A

OPINION OF THE U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1581—September Term, 1980

(Argued June 12, 1981 Judgment Filed July 24, 1981
Opinion Filed August 26, 1981)

Docket No. 81-6097

In the Matter of An Application To Enforce Administrative Subpoenas Duces Tecum Of the

SECURITIES AND EXCHANGE COMMISSION,
Applicant-Appellee,

—v.—

HERSH KNOPFLER, TIBOR LOFFLER, ANITA MAURIZIO a/k/a A. ELIZABETH CASSOTTA, RABBI KALMAN PINTER, BENJAMIN G. SPRECHER,

Respondents,

HERSH KNOPFLER, CONGREGATION OR LASHUMAIM, RABBI KALMAN PINTER, BENJAMIN G. SPRECHER,

Respondents-Appellants.

Before:

OAKES and KEARSE, *Circuit Judges*, and RE, *Chief Judge*, United States Court of International Trade.*

Appeal from an order entered in the United States District Court for the Southern District of New York, LEE P. GAGLIARDI, *Judge*, granting enforcement of subpoena duces tecum issued by appellee.

Affirmed.

STEPHEN HOCHBERG, New York, N.Y., *for Appellant Knopfler.*

SOLOMON ROSENGARTEN, New York, N.Y., *for Appellants Pinter and Congregation Or Lashumaim.*

BENJAMIN G. SPRECHER, New York, N.Y., *Appellant Pro Se.*

MICHAEL K. WOLENSKY, Associate General Counsel, Securities and Exchange Commission, Washington, D.C. (Linda D. Fienberg, Assistant General Counsel; Douglas J. Scheidt, Attorney, of counsel), *for Appellee.*

* Sitting by designation.

PER CURIAM:

Appellants Hersh Knopfler, Congregation Or Lashumaim, Rabbi Kalman Pinter, and Benjamin G. Sprecher appeal from an order of the United States District Court for the Southern District of New York, Lee P. Gagliardi, Judge, granting enforcement of subpoenas duces tecum issued to them by the Securities and Exchange Commission ("Commission") in connection with its investigation of possible manipulative practices in the trading of the securities of American Technical Resources, Inc. Finding no merit in any of appellants' contentions, we affirm the order of the district court.

The Commission has the power, in its discretion, to make such investigation as it deems necessary to determine whether any person has violated federal securities laws. *E.g.*, 15 U.S.C. § 78u(a) (1976). For the purpose of such an investigation the Commission may subpoena witnesses and require the production of such books and papers as it deems relevant or material to the inquiry. *Id.* § 78u(b). In the case of a refusal to obey a subpoena, the Commission generally may seek enforcement in a federal court in any of a number of jurisdictions, including the jurisdiction in which the investigation is pending. *Id.* § 78u(c).

In the enforcement proceeding below, appellants did not contend that the statutory requirements for issuance of the subpoenas had not been met, but rather opposed enforcement on the principal ground that the Commission's investigator had caused the subpoenas to be issued for purposes of religious harassment. After receiving appellants' opposing papers and hearing oral argument, the district court found that the opposition to the Commission's application was frivolous, without merit, and interposed solely for delay. The court therefore entered

the order granting enforcement. On this appeal appellants contend principally that the district court should have held an evidentiary hearing on the merits of the claim of religious harassment. After reviewing appellants' assertions, we conclude that the district court did not abuse its discretion in declining to hold such a hearing.

Commission enforcement proceedings may be summary in nature, *see SEC v. First Security Bank of Utah*, 447 F.2d 166, 168 (10th Cir. 1971), *cert. denied*, 404 U.S. 1038 (1972); *cf. SEC v. Sprecher*, 594 F.2d 317, 320 (2d Cir. 1979), and it is within the discretion of the district court to determine whether or not an evidentiary hearing is required. *United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36, 42-43 n.9 (2d Cir.), *cert. denied*, 439 U.S. 822 (1978). When the Commission has met the normal statutory prerequisites for enforcement, the opponent of a subpoena has a heavy burden if he seeks denial of enforcement on the ground that the subpoena is sought for an invalid purpose. *United States v. LaSalle National Bank*, 437 U.S. 298, 316 (1978). He must prove that the improper purpose is that of the Commission, not merely that of one of its investigators, *id.*, and the burden may not be met by the presentation of conclusory allegations. An evidentiary hearing is not required in the absence of a meaningful and substantial factual showing. *SEC v. Howatt*, 525 F.2d 226, 229 (1st Cir. 1975); *United States v. Newman*, 441 F.2d 165, 169 (5th Cir. 1971). In the present case, even if the presentation be deemed to impute bad faith to the Commission itself rather than to the investigating agent, the showing was inadequate to require the district court to order a hearing. *See, e.g., United States v. Morgan Guaranty Trust Co., supra.*

The order of the district court granting enforcement of the subpoenas is affirmed. The mandate shall issue forthwith.

600—8-26-81 • USCA—5009-A

RECORD PRESS, INC., 157 Chambers St., N.Y. 10007 (212) 243-5775

EXHIBIT B

ORDER OF THE U. S. COURT OF APPEALS
DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of September, one thousand nine hundred and eighty-one.

----------x

In the Matter of

An Application to Enforce

Administrative Subpoenas Duces Tecum

of the

SECURITIES AND EXCHANGE COMMISSION,

Applicant-Appellee,

-v-

HERSH KNOPFLER, TIBOR LOFFLER, ANITA MAURIZIO a/k/a A. ELIZABETH CASSOTTA, CONGREGATION OR LASHUMAIM, RABBI KALMAN PINTER, BENJAMIN G. SPRECHER,

Respondents,

HERSH KNOPFLER, CONGREGATION OR LASHUMAIM, RABBI KALMAN PINTER, BENJAMIN G. SPRECHER,

Respondents-Appellants

----------x

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the respondents-appellants, Hersh Knopfler, Congregation Or Lashumaim, Rabbi Kalman Pinter and Benjamin G. Sprecher.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 18 1981
ALEXANDER L. STEVAS

No. 81-849

In the Supreme Court of the United States

OCTOBER TERM, 1981

BENJAMIN G. SPRECHER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

EDWARD F. GREENE
General Counsel

PAUL GONSON
Solicitor

MICHAEL K. WOLENSKY
Associate General Counsel

LINDA D. FIENBERG
Assistant General Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether the district court abused its discretion by denying petitioner's request for an evidentiary hearing in a summary subpoena enforcement proceeding, arising out of a Securities and Exchange Commission investigation into possible violations of the anti-fraud provisions of the federal securities laws, when petitioner's defenses were found by the district court to be frivolous, without merit, and interposed solely for the purpose of delay.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Argument	6
Conclusion	12
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

Baldridge v. *United States*, 406 F.2d 526	6
Barney v. *United States*, 568 F.2d 116	6
Donaldson v. *United States*, 400 U.S. 517	7
FTC v. *Atlantic Richfield Co.*, 567 F.2d 96	7
FTC v. *Browning*, 435 F.2d 96	6
FTC v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900	6
Grathwohl v. *United States*, 401 F.2d 166	6
Kurshan v. *Riley*, 484 F.2d 952	6
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322	11
Paul F. Newton & Co. v. *Texas Commerce Bank*, 630 F.2d 1111	2
SEC v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, cert. denied, 415 U.S. 915	7
SEC v. *Dresser Industries, Inc.*, 628 F.2d 1368, cert. denied, 449 U.S. 993	9

Cases—Continued

	Page
SEC v. *ESM Government Securities, Inc.*, 645 F.2d 310	10
SEC v. *First Financial Group of Texas, Inc.*, 659 F.2d 660	9
SEC v. *Five Star Coal Co.*, C.A. No. C-2-77-832 (S.D. Ohio 1977)	9
SEC v. *Howatt*, 525 F.2d 226	9
SEC v. *Laird*, 598 F.2d 1162	6
SEC v. *Sprecher*, 594 F.2d 317	9
United States v. *Arthur Andersen & Co.*, 623 F.2d 720, cert. denied, 449 U.S. 1021	6
United States v. *Carpenter*, 425 F.2d 264	6
United States v. *Church of Scientology of California*, 520 F.2d 818	8
United States v. *Deak-Perera International Banking Corp.*, 610 F.2d 89	6
United States v. *Friedman*, 532 F.2d 928	6
United States v. *Garden State National Bank*, 607 F.2d 61	8
United States v. *Harris*, 628 F.2d 875	8
United States v. *Kis*, 658 F.2d 526	6, 8
United States v. *LaSalle National Bank*, 437 U.S. 298	5, 11
United States v. *Lyons*, 442 F.2d 1144	6
United States v. *McCarthy*, 514 F.2d 368	8
United States v. *Morgan Guaranty Trust Co.*, 572 F.2d 36, cert. denied, 439 U.S. 822	8
United States v. *Morton Salt Co.*, 338 U.S. 632	7
United States v. *Olson*, 604 F.2d 29	6
United States v. *Powell*, 379 U.S. 48	7
United States v. *Salter*, 432 F.2d 697	8, 9
Vesco v. *SEC*, 462 F.2d 1350	6

Statutes and rule:

Internal Revenue Code (26 U.S.C.):	
Section 7402(b)	8
Section 7602	8

Statutes and rule—Continued

Page

Securities Act of 1933, 15 U.S.C. 77a *et seq.*:

Section 17(a), 15 U.S.C. 77q(a) 2
Section 19(b), 15 U.S.C. 77s(b) 2, 3a
Section 22(b), 15 U.S.C. 77v(b) 2

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:

Section 10(b), 15 U.S.C. 78j(b) 2
Section 21(a), 15 U.S.C. 78u(a) 2, 3a
Section 21(b), 15 U.S.C. 78u(b) 2, 3a-4a
Section 21(c), 15 U.S.C. 78u(c) 2

Fed. R. Civ. P. 81(a)(3) 7

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-849

BENJAMIN G. SPRECHER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31-34) is reported at 658 F.2d 25. The order of the district court (App. A, *infra*, 1a-2a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1981. The court of appeals denied rehearing on September 14, 1981 (Pet. App. 36-37). The petition for a writ of certiorari was filed on

[1] The district court's order was not included in the appendix to the petition for certiorari. It is attached as an appendix to this brief.

November 5, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 22(b) of the Securities Act of 1933, 15 U.S.C. 77v(b), and Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(c), are set forth at Pet. 6-7. Section 19(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), and Section 21(a) and (b) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a) and (b), are set forth in Appendix B to this brief in pertinent part (App. B, *infra*, 3a-4a).

STATEMENT

1. In April 1980, the Securities and Exchange Commission ordered a formal investigation to determine whether American Technical Resources ("ATR") and others had violated anti-fraud provisions of the federal securities laws[2] by, among other things, effecting a series of transactions in ATR's common stock, thereby manipulating the price for the purpose of inducing the purchase or sale of such securities to others (A. 31-33).[3] Pursuant to the Commission's order of investigation, duly desig-

---

[2] Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b).

[3] The Commission initiated its investigation because of unusual price movements in ATR stock which suggested price manipulation in possible violation of the federal securities laws (A. 9 ¶ 12). An inspection of certain records of Datek Securities Corporation ("Datek"), an ATR "market maker" (see *Paul F. Newton & Co.* v. *Texas Commerce Bank*, 630 F.2d 1111, 1113 (5th Cir. 1980)), raised additional questions concerning trading in ATR stock (A. 9 ¶ 13). ("A." refers to the joint appendix of the court of appeals.)

nated Commission officers issued subpoenas duces tecum to petitioner (A. 126-131, 140-145)—a former president of ATR who had engaged in securities transactions involving large holdings of ATR stock (A. 20-21)—and other persons calling for testimony and the production of documents pertaining to transactions in ATR securities.[4]

2. Petitioner and certain other persons refused to comply with the Commission's subpoenas, charging that they were issued because of religious bias and harassment on the part of the Commission. Although given an opportunity to do so by the Commission during the investigation, they were unable to substantiate their charges, and, although offered opportunities to comply voluntarily, they persisted in their refusal to comply with the Commission's subpoenas (A. 13 ¶ 27, 14 ¶ 30, 23 ¶¶ 77-81, 25 ¶ 90, 52-53, 139-145, 187, 204, 265a, 265b).[5]

---

[4] In addition to petitioner, the other witnesses to whom subpoenas were directed included Hersh Knopfler (a registered representative employed by Datek who had engaged in significant tradings in ATR stock and played a major role in Datek's decision to make a market in ATR stock); Congregation Or Lashumaim (the registered holder of 60,000 shares of ATR stock and an entity that maintained a brokerage account at Datek); Rabbi Kalman Pinter (the president of Congregation Or Lashumaim who had introduced the Congregation account to Datek and was authorized to effect securities transactions in the Congregation's account); and Tibor Loffler and Anita Maurizio (individuals who purchased or sold ATR securities during the period from December 1979 to March 1980) (A. 10-25).

[5] These persons failed to produce any credible evidence of religious bias to either the Regional Administrator of the Commission's New York Regional Office or the Commission's Ethics Counsel who conducted an independent inquiry (A. 52, 187, 204, 205, 265a, 265b).

3. In April 1981, the Commission applied to the United States District Court for the Southern District of New York for an order enforcing its subpoenas. The affidavit and documentation submitted in support of the application demonstrated a proper basis for the Commission's investigation and the relevance of the information sought (A. 1-179). Following an adversary proceeding, during which the district court considered the affidavits of the parties and argument of counsel, the district court denied petitioner's request for an evidentiary hearing, and ordered the subpoenas enforced, expressly finding from the bench that (A. 240):

> the [legal] arguments presented against this application * * * are of no substance, that the factual papers as submitted in opposition are frivolous, without merit, and that this application is opposed solely for the purpose of delay * * *.

4. The court of appeals affirmed per curiam and ordered that the mandate be issued forthwith (Pet. App. 31-34). The court noted that the Commission's demonstration that it had met the statutory requirements for issuance of the subpoenas was uncontested and that respondents' opposition was based primarily on the allegation that the subpoenas had been issued for purposes of religious harassment.[6] In light of

---

[6] Petitioner did not rely upon this charge in the affidavit which he filed in opposition in the district court. Rather, he alleged Commission staff harassment, perjury, improper venue, and failure to transfer the case to the United States District Court for the Eastern District of New York, where he had filed an action for damages and other relief against the Commission and several Commission attorneys (A. 266-282). See *Sprecher* v. *Graber*, No. CV-81-1164 (E.D.N.Y.).

this Court's decision in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 316 (1978), the court of appeals held that once the Commission has met the statutory prerequisites for enforcement, the recipient of a subpoena has a heavy burden, which cannot be met by conclusory allegations, if he opposes enforcement on the ground that the subpoena is sought for an invalid purpose (Pet. App. 34). Moreover, the court cited *LaSalle National Bank*, *supra*, for the principle that a subpoena recipient "must prove that the improper purpose is that of the Commission, not merely that of one of its investigators, * * * and the burden may not be met by the presentation of conclusory allegations" (Pet. App. 34).

The court of appeals further found that the district court did not abuse its discretion in declining to hold an evidentiary hearing, noting that such a hearing is not required absent "a meaningful and substantial factual showing" by the opponents of the subpoena that such a hearing is necessary (Pet. App. 34). The court of appeals expressly held that, even assuming arguendo that petitioner's allegations could be deemed to apply to the Commission itself, rather than just to a member of its staff, petitioner's showing in the district court was inadequate to require the district court to order an evidentiary hearing (*ibid.*).[7]

As noted above, the district court here found these arguments to be frivolous and without merit (A. 240) and the court of appeals affirmed.

[7] Subsequently, petitioner's motions for recall of the mandate, for rehearing, and for a stay of the district court enforcement order pending petition for certiorari were denied by the court of appeals.

On September 25, 1981, subsequent to the decision of the court of appeals, petitioner fully complied with the subpoena.[8]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. Petitioner has complied with the subpoena that he seeks to challenge in this Court. In these circumstances, the present case is moot.[9] Moreover, even if the case were not moot, this Court should not exercise its discretion to grant a petition for a writ of certiorari in a case in which the subpoena at issue has been fully complied with, the factual and legal issues presented by petitioner are devoid of continu-

---

[8] The other respondents in the subpoena enforcement action have likewise complied with the subpoenas issued to them.

[9] See, *e.g.*, *United States* v. *Kis*, 658 F.2d 526, 532-535 (7th Cir. 1981); *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021 (1980); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *United States* v. *Olson*, 604 F.2d 29, 31 (8th Cir. 1979); *SEC* v. *Laird*, 598 F.2d 1162, 1163 (9th Cir. 1979); *Barney* v. *United States*, 568 F.2d 116, 117 (8th Cir. 1978); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *Vesco* v. *SEC*, 462 F.2d 1350 (3d Cir. 1972); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971); *United States* v. *Carpenter*, 425 F.2d 264, 265 (5th Cir. 1970); *Baldridge* v. *United States*, 406 F.2d 526, 527 (5th Cir. 1969); *Grathwohl* v. *United States*, 401 F.2d 166, 167 (5th Cir. 1968). But see *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900 (5th Cir. 1978). Contra, *United States* v. *Friedman*, 532 F.2d 928, 931 (3d Cir. 1976); *FTC* v. *Browning*, 435 F.2d 96, 97-98 n.1 (D.C. Cir. 1970).

ing practical significance, and any opinion rendered by the Court would have the characteristics of an advisory opinion.

2. Petitioner does not contend that the SEC failed to make a prima facie case justifying enforcement of its subpoena.[10] Rather, his principal contentions are that the court of appeals erred by holding that he was not entitled to an evidentiary hearing, and that there is a conflict among the circuits on this issue (Pet. 10-19).

Both of these contentions are without merit. While subpoena enforcement proceedings are adversary proceedings, they may still be decided in a summary manner without the holding of an evidentiary hearing.[11] Whether or not to hold an evidentiary hearing in any given case is a matter to be determined in light of the particular circumstances involved. *FTC* v. *Atlantic Richfield Co.*, 567 F.2d 96, 106 n.22 (D.C. Cir. 1977).[12]

---

[10] Thus, petitioner does not contend that: (1) the SEC's investigation of trading in ATR securities is not within its statutory authority; (2) the subpoena does not seek information relevant to that investigation; or (3) the SEC did not satisfy all the necessary administrative prerequisites before issuing the subpoena. It is undisputed that the subpoena meets all of these requirements. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950); cf. *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *SEC* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053-1055 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974).

[11] *Donaldson* v. *United States*, 400 U.S. 517, 528-529 (1971); *United States* v. *Powell*, *supra*, 379 U.S. at 58. See Fed. R. Civ. P. 81(a)(3).

[12] A district court's determination whether to hold an evidentiary hearing on the issue of institutional bad faith is committed to the court's discretion and should not be reversed

As petitioner indicates, there are several cases in which taxpayers were accorded an evidentiary hearing when contesting the enforcement of an Internal Revenue Service (IRS) summons in an action brought under 26 U.S.C. 7402(b).[13] Even if it were assumed that the IRS summons cases cited by petitioner were relevant here, they do not support his contentions. They do not hold that a subpoena recipient can compel the holding of an evidentiary hearing merely by reciting conclusory and unsupported charges. Such a result would be incompatible with the settled principle that the decision whether to hold an evidentiary hearing is largely a matter within the sound discretion of the district court.[14]

Moreover, these cases on which petitioner relies all consider the statutory scheme under the Internal Revenue Code for enforcement of a summons issued pursuant to 26 U.S.C. 7602, which has been held to limit the IRS' summons authority to specified pur-

---

absent an abuse of that discretion. See, *e.g.*, *United States* v. *Morgan Guaranty Trust Co.*, 572 F.2d 36 (2d Cir.), cert. denied, 439 U.S. 822 (1978).

[13] See *e.g.*, *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981); *United States* v. *Harris*, 628 F.2d 875 (5th Cir. 1980); *United States* v. *Garden State National Bank*, 607 F.2d 61 (3d Cir. 1979); *United States* v. *Church of Scientology of California*, 520 F.2d 818 (9th Cir. 1975); *United States* v. *McCarthy*, 514 F.2d 368 (3d Cir. 1975); *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970).

[14] See *United States* v. *Garden State National Bank*, *supra*, 607 F.2d at 71. "Moreover, if at this stage [*i.e.*, after the taxpayer answers the government's prima facie showing] the taxpayer cannot * * * factually support a proper affirmative defense, the district court should dispose of the proceeding on the papers before it and *without an evidentiary hearing*" (emphasis added).

poses. The Commission, however, has been given a broad statutory mandate to subpoena information. See *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1377-1378 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980); *SEC* v. *First Financial Group of Texas, Inc.*, 659 F.2d 660, 667-668 (5th Cir. 1981). Thus, the court that decided *United States* v. *Salter*, *supra*, subsequently ruled that an evidentiary hearing is not required in a Commission subpoena enforcement action in the absence of "meaningful evidence that the Government might be exceeding or abusing its investigatory powers." *SEC* v. *Howatt*, 525 F.2d 226, 229 (1st Cir. 1975).

In this case the district court reviewed all of the petitioner's claims and conducted a hearing at which he was allowed to restate and supplement those claims. At the conclusion of this hearing the court expressly found "that the arguments presented against this application, the legal arguments, are of no substance, that the factual papers as submitted in opposition are frivolous, without merit, and that this application is opposed solely for the purpose of delay * * *" (A. 240).[15]

---

[15] Petitioner argues (Pet. 12-14) that two prior Commission actions demonstrate a pattern of harrassment that is allegedly continued in the instant suit. These two actions are *SEC* v. *Five Star Coal Co.*, C.A. No. C-2-77-832 (S.D. Ohio 1977), an enforcement action that was settled by dismissal with accompanying stipulations and undertakings (A. 28-29), and *SEC* v. *Sprecher*, 594 F.2d 317 (2d Cir. 1979), a subpoena enforcement action in which the Second Circuit affirmed the district court's order enforcing a Commission subpoena issued to petitioner. The courts in those actions found no improper conduct by the Commission or its employees.

Petitioner's charges of perjurious statements in the Commission's affidavit are also meritless. Petitioner's assertion

Petitioner's reliance on *SEC* v. *ESM Government Securities, Inc.*, 645 F.2d 310 (5th Cir. 1981), is also ill-founded. There, a Commission investigator was alleged to have gained access to ESM's records through "fraud, deceit, and trickery," by inducing it to permit an inspection of its records and provide information without giving notice that a formal order of investigation of ESM had been issued by the Commission. Subsequently, on the basis of information obtained during that inspection, a Commission subpoena was issued and its enforcement sought through the processes of the court. 645 F.2d at 311-312. In remanding the case to the district court which had ordered enforcement of the subpoena, the court of appeals ordered a hearing on allegations that the Commission intentionally misled ESM and that the subpoena resulted from improper access. 645 F.2d at 317-318. In the instant case, there is no allegation of fraud or deceit by the Commission or its staff in obtaining information from petitioner or of an abuse of the court's processes. Petitioner, unlike the respondent in ESM, had notice of the Commission's investigation and had an opportunity knowingly to contest Commission access to his records, which, in fact, he did.

In short, petitioner is in error in contending that the court of appeals' decision approving enforcement without an evidentiary hearing creates a conflict with other circuits. There is no indication that any court of

---

(Pet. 14-15, 27) that he provided the staff with information indicating, *inter alia*, that he had been president of ATR does not make perjurious the statement in the Commission's affidavit that the Commission obtained and verified this same information from other sources (A. 20 ¶ 70).

appeals would require an evidentiary hearing based on the claims asserted in this case.

3. Petitioner erroneously argues (Pet. 20-24) that the Commission filed its enforcement action for the purpose of denying him his right to a jury trial in *Sprecher* v. *Graber*, No. CV-81-1164 (E.D.N.Y.), a suit which he filed shortly before the filing of the Commission's subpoena enforcement action. In fact, the Commission filed its enforcement action on April 20, 1981, *i.e.*, before petitioner filed his amended complaint in *Sprecher* v. *Graber*, on May 5, 1981, in which he requested a jury trial for the first time. Petitioner's original complaint did not demand a jury trial. See A. 284-288. Moreover, the question whether petitioner is entitled to a jury trial must be determined by the court in which his suit is still pending; he has not yet been deprived of any right to trial by jury. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 323, 331-335 (1979).

4. Petitioner's final argument is that the failure to conduct an evidentiary hearing constituted a denial of due process (Pet. 25-28). This argument rests on a fundamental misreading of *United States* v. *LaSalle National Bank*, *supra*.

Contrary to petitioner's claim, this Court did not hold in *LaSalle National Bank* "that a determination as to whether an administrative agency had issued a subpoena in bad faith must be determined by looking at the actions of individual investigators" (Pet. 25). Rather, it held that the "institutional responsibility" of an agency "is not necessarily overturned by a single agent who" acts for an improper purpose. 437 U.S. at 314-316. Thus, *LaSalle* offers no support for petitioner's assertions in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

EDWARD F. GREENE
General Counsel

PAUL GONSON
Solicitor

MICHAEL K. WOLENSKY
Associate General Counsel

LINDA D. FIENBERG
Assistant General Counsel
Securities and Exchange Commission

DECEMBER 1981

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-18-304 (LPG)

In the Matter of an Application to Enforce Administrative Subpoenas Duces Tecum of the

SECURITIES AND EXCHANGE COMMISSION, APPLICANT

—against—

HERSH KNOPFLER, TIBOR LOFFLER, ANITA MAURIZIO, a/k/a A. ELIZABETH CASSOTTA, CONGREGATION OR LASHUMAIM, RABBI KALMAN PINTER, BENJAMIN G. SPRECHER, RESPONDENTS

ORDER

The Securities and Exchange Commission ("Commission"), having applied for an order enforcing its subpoena *duces tecum*, upon the Affidavit and Memorandum of Law in support of such application, after oral argument and for good cause shown,

IT IS HEREBY ORDERED that respondents appear at the New York Regional Office of the Commission, 26 Federal Plaza, Room 1100, New York, New York 10278, and give testimony in connection with the Commission's investigation into trading in the securities of American Technical Resources, as follows:

(1) Hersh Knopfler, pursuant to the subpoena duces tecum served upon him on July 3, 1980

on the 12 day of May, 1981 at 10:00 o'clock a.m.;

(2) Anita Maurizio a/k/a A. Elizabeth Cassotta, pursuant to the subpoena duces tecum served upon her on July 16, 1980 on the 7 day of May, 1981 at 10:00 o'clock a.m.;

(3) Congregation Or Lashumaim, pursuant to the subpoena duces tecum served upon it on June 13, 1980 on the 19 day of May, 1981 at 10:00 o'clock a.m.;

(4) Rabbi Kalman Pinter, pursuant to the subpoena duces tecum served upon him on June 18, 1980 on the 14 day of May, 1981 at 10:00 o'clock a.m.; and

(5) Benjamin G. Sprecher, pursuant to the subpoena duces tecum served upon him on August 12, 1980 on the 5 day of May, 1981 at 10:00 o'clock a.m.

and it is

ORDERED that this Order be personally served upon the respondents or upon their attorneys before 5:00 p.m. on April 29, 1981 by a member of the United States Marshal's Service or by any member of the staff of the Commission, and it is

ORDERED that proof of such service be filed with this Court on or before 5:00 p.m. on April 30, 1981.

/s/ L.P. Gagliardi
United States District Judge

Dated: New York, New York
April 28, 1981

APPENDIX B

Section 19(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), provides, in part:

> (b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any members of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry * * *.

Section 21(a) and (b) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a) and (b), provide, in part:

> (a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, * * *. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.
>
> (b) For the purpose of any such investigation, or any other proceeding under this chapter, any

member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry * * *.

★ U. S. GOVERNMENT PRINTING OFFICE: 1981 355355 737

Petitioner's Reply Brief

Office - Supreme Ct., U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-849

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BENJAMIN G. SPRECHER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

BENJAMIN G. SPRECHER
Pro Se
11 Park Place, Suite 1715
New York, N.Y. 10007
(212) 962-0878

TABLE OF CONTENTS

STATEMENT.....1

POINT 1: THIS CASE IS NOT MOOT.....2

CONCLUSION.....7

Best Copy Available

TABLE OF AUTHORITIES

BAKER V. CARR,
369 U.S. 186, 204, (1962).....

GRAY V. SANDERS,
372 U.S. 368, 376 (1963).....

POWELL V. McCORMACK,
395 U.S. 486, 496 (1969).....

UNITED STATES V. CONCENTRATED PHOSPHATE EXPORT ASS'N,
393 U.S. 109, (1968).....

UNITED STATES V. W.T. GRANT CO.....
345 U.S. 629 (1953)

Best Copy Available

STATEMENT

In its answer to the Petition for Certiorari in the instant case, respondent has suggested that this case is moot. For the reasons set forth in the legal argument herein, petitioner submits that this matter presents a live controversy between the parties.

POINT I

THIS CASE IS NOT MOOT

Respondent has asserted that the instant case is moot because petitioner has complied with the subpoena in question. The respondent's argument is premised on the assertion that since the petition in the instant matter raises a question as to the validity of the subpoena, compliance with the subpoena renders this case moot. Petitioner submits that the instant case is clearly not moot since the issues which petitioner seeks to have this Court resolve involve an ongoing controversy between the parties.

Petitioner commenced an action against the S.E.C. and several of its employees asserting that the investigative order and

subpoena in question were issued for illegitmate purposes. Petitioner has sought a declaration that the subpoena is invalid and monetary damages. This action is presently pending in the United States District Court for the Eastern District of New York. Since the issues relating to the validity of the subpoena are at the core of this petition, as well as the action in the Eastern District of New York, it is evident that a resolution of this question by this Court will determine whether petitioner may continue the suit in the District Court.

Indeed, the S.E.C. and other defendants in the Eastern District of New York action have moved to dismiss those counts of the complaint in the District Court which relate to the validity of the subpoena on the grounds of collateral estoppel. Clearly, this Court's determination will be decisive

as to the motion to dismiss in the District Court. Indeed, the District Judge hearing the case has held his decision on the motion to dismiss in abeyance until this Court renders a decision on this petition. Since the rights of the parties will clearly be determined by a decision in the instant case, this matter cannot, by any stretch of the imagination, be considered moot. Manifestly, the parties have a direct and concrete interest in the outcome of the litigation. See, e.g., **Powell v. McCormack**, 395, U.S. 486, 496 (1969); **Baker v. Carr**, 369 U.S. 186, 204 (1962).

Furthermore, this case is not moot for another reason. It is well settled that a party's cessation of activity alleged to be violative of the plaintiff's rights will not necessarily moot the case. **United States v. Concentrated Phosphate Export Ass'n,** 393 U.S.

109, (1968). This is particularly true where the ''Practice'' under attack ''is deeply rooted and of long standing.'' **Gray v. Sanders,** 372 U.S. 368, 376 (1963). The Court's concern in such cases is that a failure to adjudicate the controversy would enable the defendant ''to return to his old ways.'' **United States v. W.T. Grant Co.,** 345 U.S. 629, 632 (1953). Where there is a reasonable expectation that the wrong may be repeated, the case will not be deemed moot. **Id.,** at 633.

In the instant case, the petitioner has demonstrated a pattern of unlawful conduct on the part of the S.E.C. similar to that which existed in the present case. Moreover, the possibility of the agency repeating the same conduct is manifest. Since the S.E.C. asserts that its conduct in the instant case was proper, there can be no question that it

is likely to repeat such conduct.

Given the foregoing, petitioner submits that respondent's assertion that the instant case is moot is devoid of merit and petitioner again urges this Court to grant certiorari in the instant matter.

CONCLUSION

For the foregoing reasons, the undersigned respectfully requests that this petition for a Writ of Certiorari be granted.

BENJAMIN G. SPRECHER, ESQ.